No. 3896

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PRESIDIO MINING COMPANY (a corporation), WM. S. NOYES, B. S. NOYES, L. OSBORN, JOHN W. F. PEAT, and L. M. DOHERTY,

Appellants,

vs.

W. S. OVERTON and CARL A. MARTIN,

Appellees.

BRIEF FOR APPELLANTS.

R. T. HARDING,
HENRY E. MONROE,
Solicitors for Appellants.

J. J. DUNNE,
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BRIEF FOR APPELLANTS.

General Statement.

The present appeal grows out of the litigation in which the Presido Mining Company, its officers and directorate, have, for the last six or seven years, unfortunately been involved. This litigation has heretofore been before this court and also before the Supreme Court of the United States: in that litigation, a receiver was appointed, but subsequently discharged; and the present phase of the litigation involves the liability for the loss to the company accruing from the receivership.

ASSIGNMENT OF ERRORS ON APPEAL FROM "ORDER CONFIRMING FOURTH AND FINAL REPORT AND ACCOUNT OF RECEIVER, AND ALLOWING COMPENSATION TO SAID RECEIVER AND HIS ATTORNEY" AND FROM MEMORANDUM OPINION.

Now, on the 27th day of March, 1922, come the defendants, Presidio Mining Company, a corporation, Wm. S. Noyes, B. S. Noyes, L. Osborn, John W. F. Peat and L. M. Doherty, by their solicitors, R. T. Harding and Henry E. Monroe, and say that there is manifest error on the face of the record in the above-entitled suit, and that the memorandum opinion filed herein on the 29th day of September, 1921, is erroneous, and that the "order confirming fourth and final report and account of receiver, and allowing compensation to said receiver and his attorney" made and entered in said suit on the 29th day of September, 1921, is erroneous and unjust to these defendants, and defendants hereby assign the making, giving and entering of said memorandum opinion and of said order herein as error, for the following reasons, and now make, file and present the following assignments of error upon which they and each of them will rely, as follows, to wit:

Exception I.

That the court erred in finding and decreeing in said memorandum opinion that the question whether the costs and expenses of the receiver herein shall be charged to the plaintiffs, who procured his appointment, does not arise, and was not properly presented to the court, upon the hearing for the settlement of receiver's final report and account.

Exception II.

That the court erred in finding and decreeing in said memorandum opinion that the question whether the costs and expenses of the receiver herein shall be charged to the plaintiffs, who procured his appointment, "will more properly arise on a motion to tax the costs upon the entry of the final decree".

Exception III.

That the court erred in finding and decreeing in said memorandum opinion and in said order that under the circumstances of this case the court may direct the payment of the receiver's account out of the fund in his hands in the first instance.

Exception IV.

That the court erred in finding and decreeing in said memorandum opinion that it had authority to provide for the compensation of the receiver and his attorney out of the fund administered; and this assignment of error is based upon the reason that at the time of the filing of said memorandum opinion it had been adjudged by a final judgment and decree of the United States Circuit Court of Appeals for the Ninth Circuit in this cause (Numbered 3253 on the files of that court), that there was no necessity for the appointment of a receiver in this cause, and that the appointment of said receiver was improper and illegal.

Exception V.

That the court erred in finding and decreeing in said memorandum opinion that it had authority to

provide for the compensation of the receiver and his attorney out of the fund administered; and that this assignment of error is based upon the reason that at the time of the filing of said memorandum opinion it had been adjudged by a final judgment and decree of the United States Circuit Court of Appeals for the Ninth Circuit in this cause (Numbered 3253 on the files of that court), that this court had no power to appoint a receiver in this cause, and that the appointment of said receiver was improper and illegal.

Exception VI.

That the court erred in and by said memorandum opinion and/or order in overruling the defendants' exceptions and objections to the fourth and final report and account of receiver, and allowing compensation to said receiver and his attorney.

Exception VII.

That the court erred in finding and decreeing that when the receiver took charge of the mine of the defendant, Presidio Mining Company that he found it in the neighborhood of $100,000.00, a little more or a little less, in debt; instead of finding and decreeing that said Presidio Mining Company had at the time the receiver took charge of said mine, a total of net liquid assets in excess of $100,000.00, over and above all debts and liabilities.

Exception VIII.

That the court erred in finding and decreeing in and by said memorandum opinion that the receiver

after administering said mine for a period of shortly over three years, turned it back with the expenses of operation fully paid and with something in excess of $600,000.00 in the treasury of said Presidio Mining Company, without also finding that there was due and owing from the Presidio Mining Company to Wm. S. Noyes under the lease of November 19, 1913, the sum of approximately $154,000.00, in accordance with the final judgment or decree of the United States Circuit Court of Appeals for the Ninth Circuit; and without also finding that at the time the receiver took charge of said mine there was turned over to said receiver, in liquid assets in money, liberty bonds and mining supplies of the net value of $192,279.99.

Exception IX.

That the court erred in ordering in and by the "order confirming fourth and final report and account of receiver, and allowing compensation to said receiver and his attorney", that all acts and things done by said receiver, as well as the said fourth and final report and account herein, be approved and confirmed, and that all objections and exceptions of the defendants thereto be disallowed.

Exception X.

That the court erred in ordering, in and by the "order confirming fourth and final report and account of receiver and his attorney", that the balance then remaining in the hands of the receiver, to wit: the sum of $4524.68, be divided between said receiver and his

counsel, Frank R. Wehe, and that said receiver be discharged, and his bondsmen exonerated.

Exception XI.

That the court erred in ordering in and by the "order confirming fourth and final report and account of receiver, and allowing compensation to said receiver and his attorney", that all other questions raised by the defendants on the hearing of the fourth and final report and account of the receiver be postponed, for determination, until the hearing on the final decree herein.

Exception XII.

That the court erred in overruling the objections and exceptions of the defendants to the allowance to said receiver of the following items and amounts contained in the first report and account of said receiver filed herein on the 2nd day of November, 1918, and in a supplemental report thereto filed herein on the 28th day of December, 1918, to wit:

$4270.76 paid to Walter B. Maling, as receiver's fees.

$4270.76 paid to Frank R. Wehe on account of attorney's fees.

$ 70.00 court fees.

$4500.00 paid to F. C. Handy, receiver's assistant at Shafter, Texas, ten months at $450 per month.

$ 988.33 paid to receiver's bookkeeper at varying rates.

50.00 paid for premium on receiver's bond.

579,25 paid for traveling expenses from San Francisco to the mines at Shafter, Texas, and return for W. B. Maling, F. R. Wehe and F. C. Handy.

Exception XIII.

That the court erred in overruling the objections and exceptions of the defendants to the allowance to said receiver of the following items and amounts contained in the second report and account of said receiver filed herein on the 10th day of December 1919, to wit:

$5000.00 paid to Walter B. Maling, as receiver's fees.

$5000.00 paid to Frank R. Wehe as attorney's fees for said receiver.

$5400.00 paid to F. C. Handy, receiver's assistant at Shafter, Texas.

$1225.00 paid to receiver's bookkeeper.

50.00 paid on account of premium on receiver's bond.

546.56 traveling expenses of W. B. Maling, F. R. Wehe and F. C. Handy.

3679.40 paid to Haskins & Sells, certified accountants.

2500.00 as fees paid to the Master in Chancery herein.

Exception XIV.

That the court erred in overruling the objections and exceptions of the defendants to the allowance to said receiver of the following items and amounts contained in the third report and account of said receiver filed herein on the 30th day of November, 1920, to wit:

$5000.00 paid to Walter B. Maling, as receiver's fees.

$5000.00 paid to Frenk R. Wehe, as attorney's fees for said receiver.

$5400.00 paid to F. C. Handy as receiver's assistant at Shafter, Texas.

$1500.00 paid to receiver's bookkeeper.
$ 50.00 paid as premium on receiver's bond.

Exception XV.

That the court erred in overruling the objections and exceptions of the defendants to the allowance to said receiver of the following items and amounts contained in the fourth and final report and account of receiver filed herein on the 27th day of May, 1921, to wit:

$2100.00 paid to F. C. Handy, the receiver's assistant at Shafter, Texas.
$ 500.00 paid to receiver's bookkeeper.
$ 50.00 paid on account of premium on receiver's bond.

Exception XVI.

That the court erred in not ordering and adjudging that the receiver must return to the defendants all the property which came into his possession as such receiver without deduction for the costs and expenses of the receivership herein, and that he be allowed in his accounts only such expenditures as the defendants, Presidio Mining Company, would have been compelled to make in the usual and ordinary conduct of its mining business.

Exception XVII.

That the court erred in not ordering and adjudging that the receiver must return to the defendants all the property which came into his possession as such

receiver without deduction for the costs and expenses of the receivership herein, and that he be allowed in his accounts only such expenditures as the defendant, Presidio Mining Company, would have been compelled to make in the usual and ordinary conduct of its mining business, but that said receiver have judgment against the complainants for the full amount of costs and expenses of the receivership herein.

Exception XVIII.

That the court erred in ordering and adjudging that the costs and expenses of the receivership be paid out of the funds in the hands of the receiver in the first instance, and in not also ordering and adjudging that the Presidio Mining Company and/or the defendants have judgment against the complainants for the full amount of the costs and expenses of the receivership.

Exception XIX.

That the court erred in not sustaining and/or allowing the objections and exceptions of the defendants to the fourth and final report and account of receiver, and each and all of the objections and exceptions to each and all of the preceding reports and accounts of said receiver.

Wherefore, the defendants pray that said "order confirming fourth and final report and account of receiver, and allowing compensation to said receiver and his attorney", be reversed and set aside and that the District Court be directed to sustain the objections

and exceptions of the defendants to said fourth and final report and account of the receiver, and to all preceding reports and accounts of the receiver, and that said receiver be directed to return to the defendants all property which came into his possession as such receiver without deductions for the costs and expenses of the receivership herein, and that he be allowed in his accounts only such expenditures as the defendant, Presidio Mining Company, would have been compelled to make in the usual and ordinary conduct of its mining business; and that said receiver have judgment against the complainant for the full amount of costs and expenses of the receivership herein; or that said District Court be directed to sustain the objections and exceptions of the defendants to said fourth and final report and account of the receiver and to all preceding reports and accounts of the receiver, and that said District Court be directed to ascertain and determine the full sum or amount of the costs and expenses of said receivership by deducting from the full amount of the expenditures and payments made by the receiver, including his own compensation and that of his attorney, the expenditures which the Presidio Mining Company would have been compelled to make in the usual and ordinary conduct of its mining business, and that said District Court be further ordered and directed to enter a judgment in favor of the defendant, the Presidio Mining Company and against the complainants for the difference, that is, for the costs and expenses of said receivership, and that said defendants or either or any of

them may have such further relief as may seem meet and equitable.

R. T. Harding and
Henry E. Monroe,
Solicitors for Defendants.

J. J. Dunne,
Of Counsel.

(Endorsed): Filed Mar. 27, 1922,
W. B. Maling, Clerk,
By J. A. Schaertzer,
Deputy Clerk.

I.

GENERAL HISTORY OF THIS LITIGATION.

This appeal comes up from the Southern Division of the District Court for the Northern District of California, Second Division; and by stipulation between the parties no part of the transcript of record in a former appeal, being No. 3253 upon the files of this court, was made part of the transcript of record upon the present appeal, but all pleadings, papers and matters, printed in the transcript of record in the former appeal No. 3253 may be referred to and used upon the present appeal with the same force and effect as if printed in the transcript of record on the present appeal (Trans. of Record, Vol. 2, pp. 539, 540). From the disclosures made in the transcript of record upon the former appeal and upon the present appeal, it appears that this litigation was originated by the filing of a bill of complaint by the present appellees on July 26, 1915.

Thereafter, in due course, amended and supplemental pleadings were filed by the present appellees, and in due time the present appellants made answer. Upon the issue thus made up, a trial resulted; and thereafter, on December 3, 1917, the trial judge stated his views concerning the cause in an oral opinion which will be found at page 417 of the transcript of record in No. 3253.

Thereafter, on December 28, 1917, the present appellants filed their motion to reopen the cause, but this motion was denied by the learned district judge on January 21, 1918; and the denial of this motion was fol-

lowed, on February 16, 1918, by the decree which will be found at page 424 of the record in No. 3253. From this decree, the present appellants prosecuted an appeal to this court: that appeal was very fully presented; and the result of that appeal was that this court, on October 27, 1919, made and entered the decree which will be found beginning at page 416 of volume 2 of the transcript of record in this present appeal; and the opinion upon which that decree was based will be found in volume 261 of the Federal Reporter at page 933 thereof.

Thereafter, the present appellees applied to this court for a rehearing of that cause; the rehearing was granted; the cause was reargued and resubmitted upon briefs; and thereafter, on January 17, 1921, this court reaffirmed its former opinion and judgment (Trans. of Rec. No. 3896, p. 419); and the opinion delivered by this court upon this rehearing will be found reported in volume 270 of the Federal Reporter at page 388 thereof. The present appellees then filed their petition in the Supreme Court of the United States, praying a writ of certiorari to this court, but that petition was denied by the Supreme Court on April 25, 1921; and thereupon a mandate in this cause was issued out of this court, which mandate was and is in the words of the aforesaid decree theretofore entered in this court.

In the original bill of complaint filed by the appellees, they prayed the District Court that

> "a temporary receiver be appointed to take charge of all of the affairs and business of said Presido Mining

> Company and of all its funds and property, subject to the direction of this Honorable Court''. (30.)

On August 19, 1915, by direction of Hon. M. T. Dooling, United States District Judge, the motion of the present appellants to dismiss that original bill of complaint was ordered granted unless the complainants, appellees here, within twenty days should file an amended bill stating a case for the granting of equitable relief, and incidental to this direction, the application for the receiver prayed for in the original bill was denied. Thereafter, the present appellees filed their amended bill of complaint wherein, after alleging in paragraph XIX that

> ''by reason of the foregoing facts and circumstances it is necessary that a receiver be appointed to take possession of the books, records, documents, business and moneys belonging to said corporation in San Francisco, subject to the order of this Honorable Court'' (76),

they repeated their application for the appointment of a receiver, praying

> ''that a receiver be appointed to take charge, control and possession of the San Francisco office of said Presido Mining Company, its books, records, vouchers, business and affairs, and impound and keep all moneys derived from its said mining enterprise, after payment of operating expenses, and subject to the order of this Honorable Court'';

and further,

> ''that said receiver also be authorized to receive and hold all moneys derived from operations of section 5, subject to the order of this Honorable Court''. (Trans. of Rec. No. 3253, page 79.)

When the answers came in, after meeting fully the averments in the bill generally, the present appellants

dealt with the aforesaid paragraph XIX of said amended bill and in that behalf stated as follows:

> "Answering paragraph XIX of said bill of complaint, these defendants deny that by reason of the facts and circumstances set forth in said bill of complaint, or any facts or circumstances therein set forth, it is necessary that a receiver be appointed to take possession of the books, records, documents, business and moneys belonging to said corporation in San Francisco, subject to the order of this Honorable Court" (136-7);

and they prayed that the complainants take nothing by their said amended bill of complaint (154). The same position was taken in the individual answer of Mr. W. S. Noyes, (201-2, 218).

Thereafter, on December 28, 1915, the learned judge of the District Court directed that the appellees' application for the appointment of a receiver be denied without prejudice (220). Subsequently, the appellees filed a supplemental bill, in which they asserted

> "that the controlling stock of said corporation is in the hands of William S. Noyes, his subordinates and bidable directors, and said control will remain in the hands of said parties to the continued detriment and injury of said complainants and the other minority stockholders unless a receiver is appointed for said corporation";

and followed this assertion up by praying judgment according to the prayer of the amended bill of complaint (237). And here, in passing, it may be remarked that it is impossible to conceive upon what theory the existence of the control of the stock of a corporation "in the hands" of a particular person, and the fact that "said control will remain" there, can, in itself, work "the continued detriment and injury" of another, or furnish any cause or reason for the appointment of

a receiver of the corporation, nor can it be perceived how such receivership can change the fact of that stock ownership or its attendant rights. It is common learning that a receiver takes no title to the property involved; and as the Supreme Court has pointed out the circumstance that the controlling stock of a corporation is in the hands of a particular individual, and will remain there, not only does not authorize any presumption of fraud, but it does not even authorize any inference that the directors are under the control of the owner of the majority of the shares (*Porter v. Pittsburg Steel Company* 120 U. S. 649-670). This supplemental bill was answered by the defendant, W. S. Noyes, who denied that the controlling stock was in the hands of his subordinates, admitted that the control was in the board of directors, and denied that the fact of such control "will be to the continued or any detriment or injury of complainants or other minority stockholders unless a receiver is appointed for said corporation" (259); and he prays that the complainants take nothing by their said amended bill of complaint (260); and the answer of the other defendants below, appellants here, took the same position (280-281). Subsequently, the appellees amended the prayer to their amended bill of complaint, enlarging their claims as to the receiver, and in that connection prayed:

> "That a receiver be appointed by this Honorable Court to take entire charge of the affairs, assets and property of the Presidio Mining Company wherever situate, for a period of six months, or such further time as the court direct, with full power and authority to appoint all assistants required. *That unless there is an adjustment between all parties to this suit,* the majority and minority stockholders of said corporation, within said period, that

> said receiver so appointed by this Court be authorized to sell the entire property and assets of the Presidio Mining Company, wind up its affairs, including section 5, and that said William S. Noyes and the other defendants be prohibited from in any way participating in said sale directly or indirectly, or from having anything further to do with said section 8 or section 5, or with the affairs of what is now the Presidio Mining Company." (290.)

When the trial was concluded, the learned trial judge declared, in his oral opinion of December 3, 1917, "that the circumstances are such as to authorize the appointment of a receiver for this property" (423); and thereafter, on February 20, 1918, the order of the trial judge was filed appointing a receiver.

When the cause came on for disposition in the Circuit Court of Appeals, the decree of that court reversed the order appointing a receiver which had been made by the learned trial judge.

From this hasty review of the pleadings, it is plain that the desire for the appointment of a receiver, and the claim of necessity for said appointment, originated with the complainants. In other words, since in the original bill the complainants were "W. S. Overton and Carl A. Martin, on behalf of themselves and other minority stockholders of the Presidio Mining Company named in this complaint", and since in the amended bill, those complainants were "W. S. Overton and Carl A. Martin", and since in the supplemental bill the complainants were "W. S. Overton and Carl A. Martin", it is quite plain that the desire for a receiver and the claim of necessity for the appointment of a receiver, were the desire and the claim of W. S. Overton and Carl A. Martin, the complainants upon whose

pleadings the cause was tried. These complainants alleged the necessity of the appointment of the receiver; these complainants prayed for the appointment of the receiver; upon their application, the receiver was appointed, and appointed by an order sweeping in its terms; and by them, only, was this expensive receivership unnecessarily and improperly imposed upon this enterprise. What, then, was the attitude of the defendants below, appellants here, with reference to this subject matter? A review of the pleadings will disclose that, from first to last, these defendants consistently and persistently denied any necessity for the appointment of a receiver and unbrokenly resisted the efforts of the plaintiffs below to have that appointment made. Not only did the defendants below, in so far as their pleadings are concerned, resist the appointment of this receiver, but, after the learned judge of the trial court declared his purpose to appoint a receiver, and thus the appointment of some person as a receiver became inevitable so far as the trial court was concerned, the defendants below, appellants here, entered into a stipulation as to the personality of the individual who should be appointed receiver; and that stipulation itself is a further evidence of the uniformly antagonistic attitude of the present appellants. The stipulation recites that "against the objections and exceptions of the above named defendants", the trial court is about to make its order that a receiver be appointed; it further recites that

> "it is the intention of said defendants in due and orderly course thereafter to perfect their appeal from said order appointing such receiver", and it safeguards

> the position of the defendants by recording the fact that they do not desire "this stipulation or anything herein contained to be, or to be construed to be, any waiver, *qualification,* limitation or restriction whatever upon their said appeal from said order";

and then,

> "the premises considered, understood and agreed to",

it was agreed that Mr. Maling be appointed receiver, but that

> "neither this stipulation nor anything herein contained shall in any way affect or abridge the aforesaid appeal, but, on the contrary, said appeal and all rights of said defendants therein are hereby expressly reserved, conserved and continued in the same force and effect as if this stipulation had not been entered into." (436.)

And when the appeal mentioned was perfected and reached this court, this matter of the receivership was discussed, and again, the defendants complained of the appointment and persisted in their contention that the receivership demanded by the complainants was wholly improper, and imposed upon the company, its stockholders and its property a burden as onerous as it was unnecessary. And the result was that the defendants below, appellants here, successfully resisted the imposition of this receivership upon the enterprise, and this court reversed the order creating that improper burden, and discharged the receiver.

From this history, certain conclusions follow upon which, with great respect, we cannot too earnestly insist. The first of these considerations is that, upon the present appeal, the legal impropriety of this receivership is not an open question; that impropriety is res judicata and the law of the case upon this appeal;

and upon well understood principles, the present appeal must be heard and determined in the light of the postulate that this receivership was illegal, unnecessary and wholly unjustified by the disclosures made before the learned trial court. And in the next place, the foregoing history establishes the further proposition that the resistance—the successful resistance—of the present appellants to this receivership is likewise not open to inquiry upon this present appeal; and this present appeal must proceed upon the theory that the receivership in question was consistently and unremittingly objected to by the defendants below, appellants here, until finally success crowned their efforts in that behalf. And it is further to be observed that while the learned judge denied without prejudice the application, during the earlier stages of the litigation, made by the present appellees for the appointment of a receiver, yet, after all the evidence had been adduced, the learned trial judge granted the appellees' application. In other words, when the appellees' application was granted the learned trial judge had the whole case before him; he had before him the same case which was presented thereafter to this court; and the learned trial judge made his order appointing this receiver upon precisely the same material upon which this court reversed the order appointing the receiver.

The receiver took possession on the 23rd day of February, 1918; and the ouster of the officers, directors and employees of the company from the property continued until after the Supreme Court of the United States had denied the above mentioned writ of certiorari. When the Supreme Court denied the writ, the

receiver, on the 6th day of May, 1921, returned to the corporate authorities the property of the corporation, but not all; he retained the sum of $57,730.06 referred to in Exceptions XII, XIII, XIV and XV, and about five months after the mandate of this court was spread upon the minutes of the District Court he absorbed the further sum of $4524.68 then in his possession, being the sum referred to in Exception X (see page 508 of the present transcript of record); and filed his final account. Prior to this time, the receiver had filed various reports of his administration; and the record shows that in all of these instances the defendants below, appellants here, maintained consistently their antagonism to the receivership. When the fourth and final report and account of the receiver came in, the defendants below prepared, served and filed their objections and exceptions to that report and account, which objections and exceptions will be found in volume 2 of the transcript of record upon the present appeal, beginning at page 356 thereof, and ending at page 430. These objections and exceptions are very full and explicit, and reiterate, renew and continue their opposition to the receivership and to the expenditure of any of the company's funds in connection therewith. These objections and exceptions having come on for hearing, the learned trial judge delivered the memorandum opinion which will be found at page 501 of the transcript of record upon the present appeal, and followed this memorandum opinion by an order confirming the fourth and final report and account of the receiver, which order will be found at page 504 of the present transcript of record.

II.

Jurisdiction.

Jurisdiction requires the concurrence of power over subject matter, parties and case; in the absence of a proper case for this power to operate upon, the power cannot operate; and in the absence of the facts upon which jurisdiction rightfully rests—when the facts which warrant the exercise of jurisdiction do not exist,—jurisdiction does not exist.

But, independently of this, and treating the present cause upon the assumption that it exhibits an erroneous exercise of jurisdiction merely, and that the present is a proper case for the application of "equitable discretion", still, no principle of equity justifies the taking of corporate assets or funds to defray the expense of a wrongful receivership persistently protested until finally discharged; no principle of equity requires a party to pay for the privilege of having a wrong done him, or authorizes the taking of one's property to defray an expense initiated and continued by the wrongful act of his adversary; every principle of equity justifies the view that he who creates or continues a wrong should remedy that wrong, and that he by whose act corporate assets are improperly depleted should be compelled to make reparation; and all of this is especially true where the superior equities have been adjudged to be with the wronged party, because "there is no room for the exercise of a discretion by a chancellor when a superior equity rests in one as against the other".

It cannot be doubted, we submit, that a receivership is a remedy both drastic and expensive: it suspends corporate functions; it displaces the corporate manage-

ment; and it delivers over the enterprise into the keeping of a stranger. Such was the language, purpose and effect of the order involved in the present appeal; and under its universal operation, the normal corporate authorities were ousted from the authority conferred upon them by the great majority of the stockholders and the law, and compelled to surrender the internal affairs of their company to strangers. Very naturally, then, complaint was justified of the unnecessary expense of a receivership which, at the behest of the present appellees invaded the internal affairs of the company, superseded normal corporate management, and wrested the property and affairs of the corporation from the control of its officers (*Jessup v. I. C. Ry.,* 43 Fed. 483; *United Electric Company v. Louisiana Elec. Co.,* 68 Id. 673, 676, 677; *Pearce v. Sutherland,* 164 Fed. 609, 613; *Cowell v. McMillan,* 177 Fed. 25, 43). And here, it is not irrelevant to point out that when this receivership was ordered, the enterprise of the Presidio Mining Company was a going concern: the whole record establishes that; and since no one of the persons connected with the enterprise was shown to be insolvent, or to be financially incompetent to respond to a decree, or to be doing or contemplating any act injurious to the company or any of its stockholders, that necessity which must appear in order to justify this extraordinary remedy, was not exhibited,—as observed by the Circuit Court of Appeals for the Fifth Circuit:

> "The appointment of a receiver is an extraordinary remedy, and cannot be properly resorted to unless a necessity for it is shown".

Joseph Drygoods Co. v. Hecht, 120 Fed. 760, 765;

and see, also

Gutterson v. Lebanon Co., 151 Fed. 72;
Tolman v. Ubero Plantation Co., 142 Fed. 270;
Elliott v. Superior Court, 168 Cal. 727;
Fisher v. Superior Court, 110 Id. 129;
Miller v. Kitchen, 103 N. W. 297;
Brenton v. Peck, 87 S. W. (Tex.) 898.

In other words, the appointment of a receiver calls for great caution and circumspection, properly applied in a proper case: as Mr. Justice Bradley put it, when speaking of the power of a court of equity to appoint a receiver,

> "it is undoubtedly a power to be exercised with great caution; and if possible with the consent or acquiescence of the parties interested in the fund" (*Wallace v. Loomis,* 97 U. S. 146, 162-3);

and this view of the learned justice is supported by so many well considered authorities that it would be the merest pedantry to cite them in this place. Such being the general attitude of the courts as to this matter of appointing receivers, it has led in natural sequence to the view that responsibility for the expense of a receivership must be assumed by the person at whose instigation the receiver was appointed, where that appointment was wrongful, and especially where the appointment was resisted by the adverse party and where that resistance was ultimately successful. If the expense of a receivership were to be charged upon the estate or fund without reference to the propriety of the appointment, innocent persons would suffer great loss; and no principle of ethics or equity can justify the proposition that the defendant in the receivership,

who resisted, and finally resisted successfully, the imposition of that receivership should pay the expense of the person who thus dispossessed such defendant, who ousted him from his enterprise, deprived him of his authority, and carried on his business against his will and without his consent,—no principle of equity or ethics should compel a litigant thus to pay the expense of having his own property illegally taken out of his custody and delivered over to a stranger. The authorities sustaining this view of the law will be found collected in any standard treatise dealing with the subject matter of receivers (23 R. C. L., p. 106-7, *Thompson, Corporations,* First Supplement, sec. 6458; 8 *Fletcher, Corporations,* 8933, 8991; 34 Cyc. 350 et seq.; 4 *Pom. Eq.,* last ed., sec. 1662; 23 Ency. of Law, 2nd ed., 1106; 2 *Beach Mod. Eq. Pr.,* sec. 752; *Alderson, Receivers,* secs. 95, 627 (pp. 858-860), 633; 1 *Clarke, Receivers,* sec. 837; *Gluck & Becker, Receivers of Corporations,* secs. 65 (p. 302), 80, 100; *High, Receivers,* secs. 796, 809-2; 2 *Tardy's Smith on Receivers,* sec. 627; 1 *Whitehouse, Eq. Pr.,* sec. 496, pp. 825-6; 17 Ency. Pl. & Pr., p. 840); the overwhelming weight of authority, federal and state, sustains this view; and any authority which may be cited as apparently differing from the suggestion here made will, we believe, be found on examination to be distinguishable because of the presence of consent, acquiescence, or some local statute formulating a local policy upon this topic. In California, no statute can be found which attempts to regulate this specific subject matter, but the Califor-

nian view will be found reflected in the following authorities:

Grant v. L. S. Ry., 116 Cal. 71, 75;
Ephraim v. Pacific Bank, 129 Id. 589, 592;
Ephraim v. Pacific Bank, 136 Id. 646, 651;
Elliott v. Superior Court, 168 Id. 727.

It would seem to be plain, not only upon a consideration of well understood principles affecting jurisdiction, but also upon the views expressel in the numerous authorities dealing with receiverships, that where a court has no power or authority whatever to appoint a receiver, but nevertheless makes an order appointing a receiver, the latter has not by virtue of such order any power whatever to exercise any of the functions of a receiver: because the order is absolutely void and of no effect whatever, is binding upon nobody, and may be questioned in any collateral action or proceeding; and if any fund should come into the hands of such an appointee, it would so come by his voluntary and unauthorized act, and he would be liable therefor to any party entitled to it, as for money had and received (*Colwell v. Garfield Natl. Bank,* 23 N. E. (N. Y.) 739; *Johnson v. Powers,* 32 N. W. (Neb.) 62). What, then, do we mean when we speak of lack of jurisdiction to appoint a receiver? In the memorandum opinion of the learned judge of the court below, which will be found in volume 2 of the transcript of record upon the present appeal, beginning at page 501, it is observed by the learned judge that:

> "Whether the objection that the Court had no jurisdiction in the cause, dwelt upon at such length is made seriously, it is difficult to know, but, if it is, it is without

merit as could readily have been ascertained by reference to the decree of the Circuit Court of Appeals wherein the decree of this Court was affirmed in its major features. That, of course, could not have been done in the absence of jurisdiction in this Court since the Appellate Court could have no jurisdiction to enter a decree upon the merits if jurisdiction was lacking here. The order appointing the receiver was reversed merely on the ground that the facts of the case in the opinion of the Circuit Court of Appeals did not warrant it, not that there was a want of jurisdiction to make it. In other words, the order appointing the receiver was reversed merely on the ground that jurisdiction was erroneously exercised. It is axiomatic that if a court has jurisdiction in a case it has the same power to decide erroneously as to decide correctly without exceeding its jurisdiction (U. S. v. Arredondo, 6 Pet. (U. S.) 691). Counsel have evidently confused the commission of mere error with the excess of jurisdiction. The two things are as far apart as the poles."

But the general definition of jurisdiction is the power to hear and determine concerning the subject matter in a case, and, as applied to a particular controversy, it is the power to hear and determine that controversy (*C. P. Ry. v. Placer County,* 43 Cal. 365); and any action taken in the absence of the facts upon which jurisdiction rightfully rests is void (*Scott v. McNeil,* 154 U. S. 34, 46-7). Not only, therefore, must there be jurisdiction both of the person and subject matter, but any order or judgment, to possess any validity, must accord with the established procedure governing the class in which the case in hand belongs (*Ex parte Lange,* 85 U. S. (18 Wall.) 163, 177-8; *Windsor v. McVeigh,* 93 U. S. 274; *U. S. v. Walker,* 109 U. S. 258; *Hatch v. Ferguson,* 68 Fed. 45; *Anthony v. Casey,* 5 Am. St. Rep. 277; *Seamster v. Blackstock,*

Id. 262; *Ex parte Giambonini,* 117 Cal. 573-576; *Crew v. Pratt,* 119 Id. 139, 148-9; *Johnson v. McKinnon,* 127 Am. St. Rep. 135; *Charles v. White,* Id. 674, 682-4). Every power exercised by any court must be found in and derived from the law of the land, and be exercised in the mode and manner prescribed by that law. If the court cannot try a question except under particular conditions, or when approached in a particular way, the law withholds jurisdiction, unless such conditions exist or the court is approached in the manner provided; and consent will not avail to change the provisions of the law in this regard. The validity of every order or judgment, then, depends upon the acquisition of jurisdiction; but in order that jurisdiction should exist in any tribunal, in any matter, there must be not only the abstract power to hear and determine, but also the concrete power to hear and determine the particular case, and render the particular judgment in the particular case, within the issues of that particular case, and in accordance with the established procedure governing that particular case.

Reynolds v. Stockton, 140 U. S. 254:

Within the issues;

Ex parte Reed, 100 U. S. 13:

The particular judgment;

Ex parte Giambonini, 117 Cal. 573, 576:

General rule as above; established procedure;

C. P. R. R. v. Placer County, 43 Cal. 365:

The particular judgment;

Russell v. Shurtleff, 28 Colo. 414:

The particular judgment;

Hope v. Blair, 105 Mo. 85:
Within the particular issues;
Ex parte Cox, 32 Pac. 197:
The particular judgment;
People v. Liscomb, 60 N. Y. 559:
The particular judgment;
Miskimmins v. Shaver, 58 Pac. (Wyo.) 411:
The particular judgment;
Neilsen, Petitioner, 131 U. S. 176, 183:
The particular judgment;
Ex parte Degener, 17 S. W. (Tex.) 1111:
The particular judgment;
Ex parte Lange, 85 U. S. (18 Wall.):
The particular judgment;
People v. Granice, 50 Cal. 447:
Defendant's consent unavailing;
People v. Hodges, 27 Cal. 340:
Established procedure; wrong county fatal;
Windsor v. McVeigh, 93 U. S. 274:
Established procedure;
U. S. v. Walker, 109 Id. 258:
Established procedure;
Anthony v. Casey, 5 A. S. R. 277;
Established procedure;
Seamster v. Blackstock, Id. 262:
Established procedure;
Johnson v. McKinnon, 127 A. S. R. 135:
Established procedure;
Charles v. White, Id. 674, 682-4:
Established procedure;
St. Louis Ry. v. Wear, 36 S. W. (Mo.) 357, 363—
A receivership case.

In the case last cited, it was said:

"It is urged by defendants that prohibition is not applicable to the situation existing on the circuit in the receivership case, and that no review can occur at this time as to the propriety of the disputed orders. But, if those orders were beyond the legitimate authority of the judge, the enforcement of them may be prohibited. Morris v. Lenox (1843) 8 Mo. 252. The fact that the suit in the circuit court invokes the equity powers thereof does not preclude the use of a prohibitory writ to keep the judicial action within the limits marked by law. A court of equity, no less than a court of law, may be called back within the boundaries of its rightful jurisdiction by the process of prohibition. Where a court or judge assumes to exercise a judicial power not granted by law, it matters not, so far as concerns the right to a prohibition, whether the exhibition of power occurs in a case which the court is not authorized to entertain at all, *or is merely an excessive and unauthorized application of judicial force in a cause otherwise properly cognizable by the court or judge in question.* State v. Walls (1892), 113 Mo. 42; 20 S. W. 883; in re Holmes (1895), 1 Q. B. 174. Prohibition, however, will not ordinarily be granted where the usual modes of review by appeal or writ of error furnish an adequate and efficient remedy for the correction of an injury resulting from the unauthorized exercise of judicial power. But where those remedies are inadequate to the exigency of the situaton, in a particular case, a supervising court may properly interfere by the remedy now asked. If the orders in the Kerfoot suit were in excess of the jurisdiction of the learned judge who entered them, and if they have resulted in the seizure of a large part of a railroad line, and its detention from those entitled to—and whose duty requires them to—operate it for the convenience of the public, the case is one which would permit, if not demand, the application of a writ of prohibition to correct the wrong complained of. The remedy of prohibition affords opportunity for a direct attack upon proceedings questioned upon the point of jurisdiction. *If the facts shown by a record reveal an unwarranted application of judicial power, causing an*

> *immediate and wrongful invasion of rights of property, the writ of prohibition may go to check the execution of any unfinished part of the extrajurisdictional programme that may have been outlined.* Sometimes the writ may be so shaped as to undo the steps that have been taken in such a programme. To justify the use of the writ, it is not essential that the proceedings in dispute should be so entirely void as to warrant a declaration of nullity upon a collateral inquiry. The statute governing proceedings in prohibition makes no change in the ancient law on these points. Laws 1895, p. 59."

The application of this principle to the present predicament would seem to be obvious. If, as stated by the learned trial judge,

> "the order appointing the receiver was reversed merely on the ground that the facts of the case in the opinion of the Circuit Court of Appeals did not warrant it".

then, plainly, no power or authority existed in the lower court to justify the order appointing the receiver. If it be, as we claim it is, an essential ingredient in the conception of jurisdiction that the action of the lower court should accord with the established procedure governing the class in which the case in hand belongs,—if the proper concept of jurisdiction includes not only the abstract power to hear and determine, but also the concrete power to render the particular judgment in the particular case, and if it be also true that, to employ the language of the learned trial judge, "the facts of the case did not warrant" the order appointing the receiver, upon what basis can it be correctly claimed that the making of that order was merely an erroneous exercise of jurisdiction? It is not disputed that the lower court had authority in a proper case to appoint a receiver, but a receiver could not be ap-

pointed unless the proper case existed to justify the appointment; and since the appellate court determined that this proper case did not exist, obviously the authority to appoint at all, in the pending cause, did not itself exist. In past times it seems to have been a convenient refuge for embarrassed judges to say, in certain cases, that certain acts, orders or proceedings, however flagrant in character they may have been in special cases, were simply an erroneous exercise of jurisdiction; but the development of thought in modern law has broken away from this antiquated theory; and as the foregoing authorities establish an order of court is not to be rescued from condemnation upon the theory that the court had general jurisdiction of the person and subject matter, if the particular order in question is itself without justification by a proper case to support it. Would it be said, indeed, that in an ordinary action upon an ordinary promissory note before a superior court of general jurisdiction, and of jurisdiction over the person and subject matter in that pending proceeding, an order made in such a case decreeing specific performance or directing the imprisonment for life of the defendant could be justified by the claim that the court had jurisdiction of the person and subject matter, or protected from condemnation upon the theory that it was merely the erroneous exercise of an admitted jurisdiction? While it is true that a Superior Court has jurisdiction to hear and determine an ordinary action at law brought by a private individual against a corporation for goods sold and delivered, and thus has jurisdiction of the subject matter of the action, and of the persons of the parties, would

this, under the authorities heretofore cited, justify the claim that in such an action the court would be authorized to appoint a receiver of the entire assets of the defendant corporation (*Elliott v. Superior Court,* 168 Cal. 727)?

But the learned judge of the court below speaks of the erroneous exercise of jurisdiction; and yet, if we assume the present record to exhibit an erroneous exercise of jurisdiction merely, the same result would still necessarily follow in so far as the responsibility of the applicant for the receivership, for the expense of that receivership, is concerned. Because, even if we assume that jurisdiction existed to make the appointment at all, and that therefore in the first instance the expenses of the receivership are to be met out of the assets or fund in hand, IF ANY, still that assumption does not dispose of the ultimate liability for those expenditures. If those expenditures depleted the assets or funds in a case in which it has been finally adjudged that the receivership was unwarranted, who should restore that depletion, as between the complainants below who wilfully caused the receivership and the consequent depletion, and the company whose possession was wrongfully invaded, whose property was wrongfully taken and depleted by those expenditures, whose officers were ousted without warrant, and who steadily protested until finally successful in that protest? The applicable principle, at once ethical and equitable, is thus exhibited by the Supreme Court of Montana:

> "Where a receiver is legally appointed, he is entitled to compensation for services actually rendered, though the order of appointment be vacated or reversed: Beach on

Receivers, sec. 769. But to whom should this compensation and expense be assessed? 'The compensation of a receiver is taxable costs; Hutchinson v. Hampton, 1 Mont. 39; Ervin v. Collier, 2 Mont. 605. The compensation of a legally appointed receiver, while primarily chargeable to and payable out of the property or funds in his hands, as was held in Hutchinson v. Hampton, 1 Mont. 39, is nevertheless (in absence of exceptional facts) *ultimately taxable to the losing party, whose wrong occasioned the appointment,* as was declared in Ervin v. Collier, 2 Mont. 605'; State ex rel. Cornue v. Lindsay, 24 Mont. 352; 61 Pac. 883. 'The fees of the receiver may be allowed as costs, and taxed against the losing party upon the entry of final judgment in the action (citing cases). But this does not preclude the court, upon a discharge of the receiver *before the conclusion of the action,* as was the case here, from fixing his compensation, and adjudging payment thereof against the party at whose instance he was wrongfully appointed'; State ex rel. Heinz v. District Court, 28 Mont. 22, 7; 72 Pac. 613.

In McAnrow v. Martin, 183 Ill. 467; 56 N. E. 168, the court said: 'When a receiver obtains possession of money or property under an order which is afterward reversed on appeal, and he is required to restore the money to the person entitled thereto, he cannot claim compensation out of the funds in his hands, but must look therefor to the party who secured his appointment; Weston v. Watts, 45 Hun. 219; French v. Gifford, 31 Iowa, 428; Verplanck v. Mercantile Ins. Co., 2 Paige 438; Radford v. Folsom, 55 Iowa 276; 7 N. W. 604'. The same doctrine is announced in Beach on Receivers, par. 119; Richmond v. Irons, 121 U. S. 27; 7 Sup. Ct. Rep. 788; 30 L. ed. 864; People v. Jones, 33 Mich. 303; Welch v. Renshaw, 14 Colo. App. 526; 59 Pac. 967. As was said in Ogden City v. Bear Lake etc. Irr. Co., 18 Utah 279; 55 Pac. 385: 'The expense incurred by the receiver that would have been necessary for the appellant to incur, had it remained in the possession of its property, and in the control of its business, were properly paid out of the fund, but such as it would not have been necessary for it to incur should be charged to the party procuring the order. Such expenses should be regarded as incurred in consequence of

an error at his instance; Weston v. Watts, 45 Hun. 219; City of St. Louis v. Gaslight Co., 11 Mo. App. 237; Pittsfield Nat. Bank v. Bayne, 140 N. Y. 321; 35 N. E. 630; Moyers v. Coiner, 22 Fla. 422; French v. Gifford, 31 Iowa 428'. See, also, Cassidy v. Harrelson, 1 Colo. App. 458; 29 Pac. 525.''

Hickey v. Parrott Silver Co., 108 A. S. R. 510, 516-7.

In other words, taking the learned trial judge at his word, and treating this receivership and its expense as the result of an erroneous exercise of jurisdiction merely, and assuming, moreover, that in the first instance these expenditures should come out of the company assets or funds, the question nevertheless recurs, upon whom should rest the real liability for the wrong done? Or, to put the question in a different form, in the matter of these expenditures, as between the complainants, upon the one side, and the company, upon the other, whose equities are superior?

The assumption here indulged that the appointment of the receiver was not absolutely void, but is to be treated as having been improperly made in the course of an erroneous exercise of jurisdiction, leaves quite untouched the injustice and inequity, in such a case of requiring the receiver's expenditures to be paid out of the assets or funds of the injured corporation, without affording to the latter any redress against those primarily responsible for the damage caused; and if under such circumstances, a court will be governed largely by the individual merits of each case and exercise an equitable discretion, compelling either the company or the complainants to make good those expendi-

tures as justice may require, we are thus led to the inquiry as to the respective equities of the contending parties,—for it is by the consideration of those equities that the discretion in question will be governed.

If the ultimate liability for the expenses incident to this receivership is to be determined as a matter of equitable discretion, then, if by the phrase "discretion of the court" the will of the judge rather than that of the law be intended, then the following condemnation of personal discretion by Lord Camden, one of the greatest of the constitutional lawyers of the English bar, will not be irrelevant:

> "The discretion of a judge is the law of tyrants. It is always unknown. It is different in different men. It is casual and depends upon constitution, temper and passion. In the best, it is oftentimes caprice; in the worst, it is every vice, folly and passion to which human nature can be liable."

(See this language formally adopted in *State v. Cummings,* 36 Mo. 279; and see also *Maybry v. Ross,* 48 Tenn 769.)

Judicial discretion is obviously distinguishable from sentiment (*U. S. v. Conrad,* 156 Fed. 248); it does not regard whim or caprice; it means a sound legal discretion only, which must be exercised in conformity with the rules and the analogies of the law (9 Am. & Eng. Ency. Law, 2d ed., 473-474); and

> "Where the discretion of a court is spoken of, a sound legal discretion is meant, not an arbitrary sic volo." (*People v. Supt. Ct.,* 5 Wend. 126.)

Long ago in the history of the law recognition was accorded the thought that

> "judicial discretion, when applied to a court of justice, means sound discretion guided by law. It must be governed by rule, not by humor. It must not be arbitrary, vague and fanciful, but legal and regular" (*Rex v. Wilkes,* 4 Burr. 2539;

but with the flight of time no departure from this conception is observable. Relatively recently, in New York, when speaking of judicial discretion, the following characterization was made:

> "It is always a legal discretion to be exercised in discerning the course prescribed by law. When that is discerned, it is the duty of the courts to follow it. It is to be exercised, not to give effect to the will of the judge, but to that of the law" (*Tripp v. Cook,* 26 Wend. 152);

and in another case, the court pointed out that

> "it does not mean a wild self-wilfullness, which may prompt to any and every act, but this judicial discretion is guided by the law—see what the law declares upon a given statement of facts, and then decide in accordance with law—so as to do substantial equity and justice. Judicial discretion is to see what would be just according to the law in the premises" (*Faber v. Bruner,* 13 Mo. 543).

And as put by the great Chief Justice,

> "Judicial power, as distinguished from the power of the laws has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law" (per Marshall, C. J., in *Osborn v. Bank of U. S.,* 22 U. S. (9 Wheat.) 738, 866).

There has, indeed, never been any doubt in this State as to the meaning of judicial discretion, and it has here

been uniformly held that the discretion which finds play in emergencies similar to that presented here is not an arbitrary caprice governed by no rules and disposing of the rights of litigants according to whim.

Bailey v. Taaffe, 29 Cal. 424, leading case;
Stringer v. Davis, 30 Id. 322;
Ex parte Hoge, 48 Id. 5;
Ex parte Marks, 49 Id. 681;
Lybecker v. Murray, 58 Id. 189;
Cargnani v. Cargnani, 16 Cal. App. 96.

It thus results that judicial discretion is not a name for a vague, loose or indefinite power acting independently of established rules and analogies: on the contrary, and especially at this advanced day, the term connotes the accurate ascertainment and proper application of fixed principles; and, as applied to a predicament similar to that at bar it calls for the same analysis of fact and application of legal rules as in any other situation presented to a court of justice for consideration and decision. In the exercise of judicial discretion, a court is quite as much bound by accepted doctrines, both of substantive and adjective law, as in the exercise of any other judicial function. And in this connection, as illustrative of the relevant point of view, the following observations are not inappropriate:

> "Appellants contend that their equities are superior to those of appellee, and that the court erred in placing the costs of the Wilson foreclosure on them. Appellee contends that the cost of the Wilson foreclosure was placed upon appellants by the court in the exercise of a sound discretion, which is conclusive of the case.
>
> Learned counsel for appellee have cited numerous authorities in support of the position that costs are not

necessarily adjudged against the losing party in chancery cases, but that the chancellor may, in the exercise of a sound discretion, apportion the costs according to equitable principles when the facts justify. The rule contended for is sound, but is only applied when equities between the various parties warrant it. For example, if one party is at fault more than another, it is proper to distribute the costs according to the fault of each; or, if equally at fault, to divide the costs, or to adjudge the entire costs against the party wholly at fault. *But the rule is not applicable in cases where one party has superior equities to the other. The costs in that character of case should never be adjudged against a party holding superior equities.* For example, a prior lienor should recover the costs necessary to enforce his lien before a junior lienor would be entitled to his debt or costs. *There is no room for the exercise of a discretion by a chancellor when a superior equity rests in one as against the other.*"

Fry v. White, 201 S. W. (Ark.) 1105.

And here considerations may be suggested which not only distinguish citations which may be made by the other side, but also should direct any discretion exercisable in the premises, toward charging the expense of the receivership against those who cause it. One of the first features which appeals to the mind in looking back over the history of this litigation is this, that the objectionable receivership was the direct product of an erroneous view of the whole cause, an erroneous view whereby the real equities of the parties were wholly mistaken. This may be illustrated by developing a statement made by the learned trial judge in his memorandum opinion, in this case.

In the opinion of the learned trial judge, the statement was made that "the decree of this court was affirmed in its major features"; but with every respect

for the learned trial judge, we are constrained to say that our reading of the opinions of this court convinces us that the decree of the learned trial judge was not affirmed in its major features, but was reversed. Some few illustrations will make this clear. The decree of the trial court, which will be found at page 424 of the transcript of record in number 3253, when read in connection with the oral opinion of December 3, 1917, fairly reflects the "major features" in question. One of these features was the acquisition of the Osborn stock by Mr. William S. Noyes; and that feature will be found dealt with in the oral opinion above mentioned, at page 418-9 of the transcript of record in number 3253, and in the reversed interlocutory decree which flowed from it. The position taken by the learned trial judge was that:

> "The Osborne shortage, I am satisfied, came to the knowledge of the defendant, William S. Noyes, as early as December, 1912; that he took advantage of it to secure from Osborne that stock without any real compensation whatsoever; and that it was by the use of funds which belonged to the company, but in a manner that never resulted in the shortage being made good to the company. Of course, as a book transaction it appeared to be, but in reality it was not. I need not recite the various circumstances which culminated in the control of this corporation coming absolutely within the hands of William S. Noyes; it was by a series of transactions which to my mind led to but one result, and that is the conclusion that it was not a just and fair transaction."

This was one of the "major features" referred to by the learned trial judge; was it affirmed by the appellate court? In dealing with this feature of the cause, this

court, after going over the relevant facts, summed the situation up thus:

> "In other words Noyes placed in the records of the corporation the usual evidence of his rightful, legal ownership of that stock. Noyes left San Francisco for the mine four days later and he testified that on January 19th or 20th he first learned of the Osborn shortage by a telegram from his brother B. S. Noyes in San Francisco.
>
> The plaintiffs claim that Noyes knew of this shortage before he left for the mine and that he obtained the transfer of the stock from Osborn to himself under a threat to expose Osborn and bring him and his family to disgrace. *Aside from the absurdity of charging Noyes with extortion in securing the legal title to his own property, there is no evidence to support even the color of coercion in the transfer".*

And again, still dealing with this subject matter, and after reviewing the testimony of the witness Kniffin, this court further observed:

> "This uncontradicted fact alone appears to be sufficient to establish the truth of Noyes' testimony. But in any point of view, the burden of proof rests on the plaintiffs to prove their charge clearly and distinctly and overcome the direct and positive testimony of B. S. Noyes and Laura M. Doherty confirming and corroborating the testimony of Wm. S. Noyes upon this question.
>
> Plaintiffs also charge that Noyes extorted from Osborn the stock he held in his own right which he was requested to transfer and did transfer as security for the money loaned him to make good his shortage. *There is no evidence or inference to support this charge and we know of no law that makes such an act extortion.*
>
> *In all of these transactions we find no evidence of fraud or of unfair or inequitable conduct on the part of Wm. S. Noyes in his dealings with the Presidio Mining Company or any of its stockholders and no assertion of a dominant, sinister power or influence over the board of directors or any of the stockholders."*

Bearing steadily in mind the attitude of the learned trial judge as displayed by his deliverances upon this topic, and contrasting with those deliverances the findings of this appellate court, will any fair man say that, so far as this topic is concerned, "the decree of this (the trial) court was affirmed in its major features"?

Another feature of the cause upon which the attitude of the learned trial judge was unmistakable, was the acquisition of Section 5; and as to that, the learned trial judge expressed himself as follows:

> "The main matter for consideration in the case—the acquisition in the name of William S. Noyes of Section 5—was enabled to be had by virtue of his getting control of the company and its board of directors; and I find that while the transaction was not carried out in that form it was nevertheless an acquisition of that property by funds of his company in fact; that Noyes alone, aside from his superintendent Gleim, was, of all the people connected with the company, fully cognizant of the character of Section 5 and its value; that while he manipulated the securing of the control of that section and its eventual transfer to his name by means which might upon their face bear the impress of having been procured by funds other than those of the company, nevertheless he knew at the time that he had potential control of this company and that he could procure the means or funds from the company with which to pay for this land; and that he pursued a course which brought that result about."

But, in dealing with this feature of the cause, this court had the following to say:

> "Were the moneys used to pay these Noyes notes taken from the treasury of the corporation? The evidence in the record is that it was not so taken."

The court then referred to the testimony of Mr. Noyes giving minute details as to the sources from which the moneys came, to the inquiries of the learned trial judge himself into that subject matter, and to the admission made by the solicitor for the complainants below, and then proceeded:

> "This testimony stands uncontradicted and shows beyond question that Noyes gave his notes in the first instance to secure the money and credit to buy the stock of the Silver Hill Mill and Mining Company owning Section 5 and that he subsequently paid these notes not out of the funds of the corporation, but out of his own pocket, and this fact is finally and conclusively found by the court in the interlocutory decree which, while it determines that Wm. S. Noyes is a trustee for said Section 5 for the benefit of the Presidio Mining Company provides that such title is 'subject however to the payment of its purchase price of $24,009.33 and taxes or assessments paid by him on Section 5, or other moneys properly paid by him on account of Section 5, and that he be allowed interest on all of said sums from the date of payments made by him at the rate of seven per cent. per annum'.
>
> If the money paid by Noyes for Section 5 is to be refunded to him as directed by the Interlocutory Decree, it follows as a matter of course that the money was paid by Noyes out of his own funds and not out of the funds of the corporation, nor out of any funds received from the corporation in any other than in a legitimate and proper business way."

Again, we ask, was this feature of the cause, also, affirmed by the Court of Appeals? There is, we submit, but a single answer possible to this inquiry.

In dealing with Section 5, a conceded "major feature" of the case, the learned trial judge summarized his attitude in the following language:

> "Under these circumstances, I am satisfied that equity, which looks to the substance and ignores the mere form

> in which a transaction is cast will hold that property in equity to be the property of the Presidio Mining Company'':

Were these views of the learned trial judge relative to this feature of the controversy affirmed by the Appellate Court? The acquisition in the name of William S. Noyes, of Section 5, was declared by the learned trial judge to be ''the main matter for consideration in the case'', and the learned judge added that the acquisition of Section 5 in the name of Mr. Noyes

> ''was nevertheless an acquisition of that property by funds of this company in fact'',

and that the entire transaction from start to finish was

> ''in fraud of the rights of its (the company's) minority stockholders and in fact in fraud of the rights of all excepting those who were in the transaction with Mr. Noyes''.

Do the opinions of the Appellate Court sustain the views here expressed? In the original opinion on appeal, after discussing the case generally, and after declaring that

> *''in all of these transactions we find no evidence of fraud or of unfair or inequitable conduct on the part of William S. Noyes in his dealings with the Presidio Mining Company, or any of its stockholders and no assertion of a dominant, sinister power or influence over the board of directors or any of the stockholders'',*

this court went on to say that:

> ''It is clear from this evidence that Noyes purchased Section 5 with his own money but for the benefit of the Presidio Mining Company; that he has always been ready to convey it to the company upon the payment to him of its purchase price and as late as February 28,

1916, in his last report to the stockholders, he declared in effect that he held the title for that purpose and no other."

And again, after having granted a rehearing, and after having reconsidered the whole case, this court said:

"Noyes admits that he purchased the title to Section 5 for the Presidio Mining Company. It has been judicially determined that he did so with his own money as the decree recites, and the record shows that he has been ready and willing at all times since said purchase to convey the title to the Presidio Mining Company upon being paid the purchase price. He does not refuse to convey. He does not hold the title fraudulently. His willingness to convey upon the payment of the purchase price deprives equity of its jurisdiction to declare Noyes' relation to the title fraudulent."

Another feature of the cause, and a "major feature" if we are to adopt the language of the learned trial judge, was the so-called "bonus resolution",—a resolution which the learned trial judge referred to in the following language:

"This so-called bonus resolution, I think, was as bald a fraud as has ever fallen under my observation. It was without any character of fundamental right in its inception; and, of course, the finding being that the title to this Section 5 should really be in this corporation, all the benefits that accrued to Mr. William S. Noyes from that transaction, as well as the subsequent lease which I hold likewise to be void, must be accounted for."

Was this "major feature", also, affirmed by the Court of Appeals?

Dealing with that topic, this court, among other things, speaking of the bonus resolution, and after de-

scribing it in the original opinion as "a temporary arrangement to accomplish a temporary purpose", thus fixes its quality in the opinion on rehearing:

> "The 'bonus resolution' is a misnomer. It did not provide for the payment of money as additional compensation or as compensation at all, but for ore delivered by Noyes from Section 5 to the Presidio Mining Company. This fact was set forth in the defendants answer and clearly established by the evidence."

And, again, in the original opinion, still dealing with the so-called bonus resolution, this court declared that

> "the security of the Presidio Mining Company for the agreement was ample and rested in the fact that the payments were to be made out of the earnings of the Company and from no other source; that the ore already exposed and broken down was of a high grade; was in sight and available for delivery to enable the company to make the payments at the dates mentioned in the resolution".

And in further evidence of the proposition that no justification exists for the declaration by the learned trial judge that "the decree of this court was affirmed in its major features", we call attention, in this connection to the following unmistakable language of this appellate court:

> "*In all of these transactions we find no evidence of fraud or of unfair or inequitable conduct on the part of William S. Noyes in his dealings with the Presidio Mining Company or any of its stockholders and no assertion of a dominant, sinister power or influence over the Board of Directors or any of the stockholders. * * * Upon the face of the record and in view of all the evidence, we are of the opinion that the lease of January 25, 1913, the resolution of February 15, 1913, and the lease of November 19, 1913, were all legal, just and equitable in their terms and for a valuable consideration.*"

In the face of this convincing language, can any fair-minded man justly claim that this "major feature" of the case was affirmed by the Court of Appeals?

The quotations which we have already made from the opinions of this court establish that the view of this case taken by the learned trial judge, and the view of this case as taken by this Appellate Court, are, to adopt a phrase of the learned trial judge, "as far apart as the poles"; and if we were to extract from the opinions on appeal evidences of their complete divergence from the view formulated by the learned trial judge, we should be compelled in this place to print those opinions in their entirety. So far as the minor charges are concerned, which these appellees labored so industriously during the earlier stages of the cause, this court observed that

> "there are a number of other minor charges against the defendants which we do not think of sufficient importance to review. We have, however, examined the evidence relating to them and we find them not proven";

and in the opinion upon rehearing, this court further observed that

> "we find nothing which justifies any decree other than a decree for conveyance of Section 5 by Noyes to the company upon payment of the purchase price *in accordance with his offer*. That Noyes in all his dealings with the Presidio Mining Company acted in good faith is abundantly established by the evidence";

and added, after a careful re-examination of the evidence and a review of the argument on this rehearing,

> "we find no reason for changing our original opinion in any material matter. In our former opinion we found the charges of conspiracy and fraud directed against

William S. Noyes and his co-defendants unsupported by the evidence".

The amount of the salaries of the corporate officers was another "major feature" of the case which attracted considerable attention in the court below; and upon this subject matter, the learned trial judge expressed himself as follows:

> "I am satisfied under the evidence that the large increases of the salaries of these officers, under the circumstances which the evidence discloses, were not honest; that the situation did not call for such increases, and, having been made under circumstances where they must be explained, they must be accounted for, and unless they can be explained, the officers will have to account for the excess that has been added to their salaries by the various raises that have been shown."

Was the view here formulated affirmed by the Court of Appeals? That subject matter was quite fully considered by this court, and, without quoting at length, the following may be excerpted from the original opinion:

> "The burden of proof was upon the plaintiffs to prove the illegal and fraudulent character of the salaries paid to the directors and officers in San Francisco. The presumption is that salaries paid for so many years to these officers prior to November, 1914, without protest or objection on the part of the minority or other stockholders were reasonable and just and the reduction of these salaries in November, 1914, eight months before the commencement of this suit, was clearly evidence of a just regard for the interest of the company and its stockholders and is directly in contradiction of plaintiff's claim and the finding of the interlocutory decree that the salaries were all illegal and fraudulent."
>
> "The defendants had already produced evidence that the salaries were reasonable and just, partly by direct

> testimony and partly by evidence of a continuance of salaries for a number of years without protest or objection on the part of the minority or other stockholders and by evidence of a reduction of salaries prior to the commencement of this action to meet the depreciation in the price of silver. This evidence was not contradicted and certainly no inference of fraud or injustice can be drawn from this state of the evidence which tends to show that the salaries were at all times just and reasonable."

It is submitted that no candid person can arise from the reading of the oral opinion of the learned judge of the court below without realizing that the governing thought in his mind was

> "a uniform and persistent course of fraudulent manipulation of the affairs of this corporation" (Trans. of Record No. 3253, p. 420);

and that a prominent feature of this course of fraud—a "major feature" to adopt the learned judge's language,—was the lease of November 19, 1913. But that, in this "major feature" also, the views of the learned trial judge were rejected by this court, the following excerpts from the original opinion of this court do, we conceive, abundantly establish:

> "It follows that the recitals in the lease of November 19, 1913, concerning the terms of the lease of January 25, 1913 'that the profit made by the Presidio Mining Company out of the ores taken from Section 5 up to that date had been unduly large and unfair to Noyes' were absolutely correct if limited to the terms of that lease and justified Noyes in terminating that lease and the Presidio Mining Company in entering into a new lease that would state the actual facts and correctly represent the rights of the parties thereto."

And this court, in that same original opinion, further observed that:

> *"Upon the face of the record and in view of all the evidence we are of the opinion that the lease of January 25, 1913, the resolution of February 15th, 1913, and the lease of November 19, 1913, were all legal, just and equitable in their terms and for a valuable consideration."*

Not only this, but in summarizing the situation in the opinion upon rehearing, this court took occasion to observe:

> "After a careful re-examination of the evidence and a review of the argument on this rehearing, we find no reason for changing our original opinion in any material matter. In our former opinion we found the charges of conspiracy and fraud directed against Wm. S. Noyes and his co-defendants unsupported by the evidence. This conclusion left the case as Judge Dooling found it upon the insufficiency of the original complaint with respect to the controlling question in the case, namely.
>
> 1. The evidence did not show that Section 5 was bought with the money of the Presidio Mining Company;
>
> 2. The evidence did not show, that the lease of November 19, 1913, was not profitable to the Presidio Mining Company;
>
> 3. The evidence did not show that Wm. S. Noyes was not the owner of Section 5;
>
> 4. The evidence did not show any legal or equitable interest of the Presidio Mining Company in Section 5;
>
> 5. The evidence did not show that the salaries paid the officers of the company were illegal or fraudulent, but on the contrary the evidence did show that such salaries were reasonable and just."

This somewhat incomplete comparison and contrast between the views of the learned trial judge, upon which his interlocutory decree was predicated, and the views of this court upon appeal make it very clear,

we believe that the statement of the learned trial judge that "the decree of this court was affirmed in its major features" is not sustained; in point of fact, the only portion of the interlocutory decree which was affirmed was that portion which dealt with Section 5,—a section which William S. Noyes was ready, able and willing at all times, and without any judicial decree whatever to compel him to do so, to transfer to the Presidio Mining Company upon payment of its purchase price and incidental moneys: but in all other respects, including the injunction and the receivership, the decree appealed from was entirely reversed. In other words, the attitude of the learned trial judge in making the order to reverse which the present appeal is prosecuted rested upon an essentially erroneous basis.

The foregoing observations, we submit, establish this receivership to have been the product of an erroneous conception of the real equities in the case; but that is not the only feature of the cause which should guide equitable discretion in the direction of requiring these expenditures to be met by those who were responsible for the receivership which occasioned them; and, in addition to the foregoing considerations, it should be pointed out that no real necessity existed for any receivership whatever, for the obvious reason that the injunctions which were issued in the cause afforded ample protection to the complainants. Those injunctions were issued upon the application of the complainants below, were directed to matters which they considered should be made the subjects of injunctive re-

lief, and covered moneys and lands and stock. To adopt the language of Circuit Judge Pardee (*New Elect. Co. v. Louisiana Elect. Co.,* 68 Fed. 673, 676, 677), limitations were imposed by these injunctions which prevented the defendants from alienating or encumbering the property or from paying out or disposing of the revenues; should not these injunctions therefore have sufficed for the protection of these complainants without the additional and expensive invasion of a receivership? Minority stockholders are not entitled to a receiver except in a most extreme case; but where defendants are restrained by injunctions which impound moneys, land and stock, where no one connected with the enterprise is shown to be unable to respond to a decree, where no claim is made that any person connected with the enterprise is doing or contemplating any act or thing injurious to the company or any of its stockholders, where the fraud asserted but unproved, is claimed to have occurred five years before the receiver was requested, and where all properly established complaints could have been met and provided for in a final decree,—where all these features, and others, concur in a cause, how can it be said that such cause is the extreme case in which the minority stockholder may displace the regular corporate authorities, suspend the corporate functions, and hand over the corporate assets and affairs into the keeping of strangers? Like a receivership, an injunction is a most drastic remedy; it is an extraordinary remedy which is reserved for extraordinary cases; no more effective *lis pendens* could well be imagined (*Barstow v. Beckett,*

110 Fed. 826, 827-8); what necessity, then, existed for this onerous receivership?

Not only was the receivership a product of an erroneous view of the cause, and not only was there no necessity for this receivership, but, in assembling the superior equities of the defendants below, appellants here, it should not be overlooked that no benefit accrued from this receivership *qua* receivership,—no benefit which had its primary origin in the receivership,—no benefit distinct from the normal benefit of ordinary operation,—no benefit other than that which flowed as a sequel from the antecedent efforts of the company itself. In this connection, it is not irrelevant to point out that during five years of the defendants' administration of the property as directors of the corporation, the assets had largely increased in value; and when the complainants sought to attribute this development to their own vigilance in guarding the company's welfare, this court pointed out that "this statement is unsupported by any evidence in the record", and that "during this time at least four-fifths of the assets of the company were accumulated" (see opinion on rehearing, 270 Fed. 388, 402).

In addition to the foregoing considerations, it must be pointed out that no consent, direct or indirect, proximate or remote, was ever given by the defendants below, appellants here, to this receivership; on the contrary, their entire course of conduct in that matter from beginning to end was one of persistent, unremitting opposition and antagonism.

Moreover, this receivership was not sought in good faith; the very fact that these complainants were adequately protected by the injunctions which had been issued, emphasizes their lack of good faith in imposing upon this company this burdensome and expensive receivership; and we do not hesitate to say that this receivership was pursued in bad faith and in the development of a rule or ruin policy; and in this connection we cannot refrain from directing the attention of the court to its opinion on rehearing wherein is quoted the letter from the complainant Overton to Mr. Gleim in Texas, on July 29, 1915, three days after the filing of the original bill of complaint, and the comments of this court upon that letter immediately following its quotation. We do not hesitate to say that the whole attitude of the only active complainant in the cause, Overton, was grossly selfish and inequitable and lacking in good faith; and the rule seems to be quite clear that the costs and charges of a receivership will be especially assessed against the applicant for the receiver if it appear that in any degree he has acted in bad faith (compare *Miller v. American Light Co.,* 181 Ill. App. 6, 23; *Bellamy v. Wichita Valley Tel. Co.,* 105 Pac. (Okla.) 340; *Wagner v. Phila. etc. Co.,* 81 Atl. (Pa.) 944; *Brock v. Rudug,* 119 N. E. (Ind.) 491; *Ogden City v. Bear Lake Irrigation Co.,* 55 Pac. (Utah) 385; *Fry v. White,* 201 S. W. (Ark.) 1105; *Sullivan Timber Co. v. Black,* 48 So. (Ala.) 870). But if further evidence of the bad faith of the only complainant who exhibited any real activity in the cause were needed, it can be found in the amazing demand in his amended prayer to

his amended bill (Trans. of Record, No. 3253, p. 290), a demand which contemplated complete extinction and annihilation of the Presidio Mining Company; and also in the condition formulated in that enlarged prayer whereby the very existence of the company is sought to be made dependent upon "an adjustment between all parties to this suit". And just here it is pertinent to inquire, looking back over the entire course of conduct of this complainant from the beginning, what he meant by an "adjustment"; and in view of all we know concerning the preposterous but unproved claims made by the individual who yearned to "control the management" of this enterprise, can there be any doubt in the mind of any rational person but that he meant nothing less than the surrender by the defendants below of their legal rights, and the abandonment by them of defenses which this court has held to be invincible?

And again, no real controversy existed as to the transfer of Section 5; it abundantly appears throughout the record and in the opinions of this court what was the attitude of Mr. Wm. S. Noyes with reference to that transfer; but, as to all matters in real controversy, including this receivership, the decree below was reversed by this court.

For reasons already advanced we respectfully insist that the learned judge of the lower court was without jurisdiction to appoint this receiver, although having jurisdiction of the subject matter and of the parties; he was without the concrete power to render that particular judgment in the particular case then pending before him, within the issues of that particular case

and/or in accordance with the established procedure governing that particular case,—in a word, while he was authorized to appoint a receiver in a proper case, yet without a proper case he had no such authority. But we have gone beyond this, and we have treated the situation from a point of view as favorable as any to which the present appellees could justly appeal; we have treated this as a case, not of the absence of jurisdiction, but of an erroneous exercise of jurisdiction merely; so treating the case, we have pointed out that courts are vested with an equitable discretion—a sound discretion responsive to existing equities, and not a capricious whim; and we have pointed out that in the exercise of this equitable discretion courts may, according to the justice and equity of each case, assess the expense of the receivership against the fund, or against the applicant, or apportion that expense among the parties, according as the respective equities may appear. We have then urged as among the adjudged superior equities of the present appellants, the fact that this objectionable receivership was the direct and immediate product of an erroneous view of the whole cause, whereby the real equities of the parties were wholly mistaken; and also that no real necessity existed for any receivership whatever, the existing injunctions furnishing ample protection to the complainants; and also the absence of any real benefit primarily originating in the receivership itself, and not a sequel from antecedent effort by the company itself; and also the absence of any consent whatever by the present appellants to this receivership and their constant and persistent opposition thereto;

and also, that the receivership was not sought in good faith, but to further a selfish and inequitable motive; and also that as to all matters in real controversy, including this receivership, the decree below was reversed by this court. What equities, then, have these appellees disclosed which can justly be said to be superior to those of the appellants? Did they make good that accusation of fraud upon which their whole case rested? In any of the particulars, described as "material features" by the learned judge below, did they sustain their contention either in this court or upon the application for certiorari? Have they traced to these appellants any single violation of any one of the injunctions which impounded lands, moneys and stock? Upon what feature of this cause which was in real controversy, can these appellees found any equity superior to those of the present appellants? The learned judge of the lower court referred to Section 5 as the main matter for consideration in the cause; but in view of the continuous purpose of Mr. William S. Noyes to transfer that section to the company—a willingness repeatedly expressed both orally and in writing,—how can it fairly be said that this transfer was ever in real controversy or could furnish any just basis upon which these appellees may properly found any equity? Throughout this entire litigation, these appellants did nothing which was not proper for the protection of their rights; and since the fundamental claim of the appellees rested upon the asserted fraud, since these appellants were absolved from that alleged fraud, since they steadily resisted the invasion of their rights and

property by a receivership now adjudicated illegal, it is submitted to be impossible to perceive the equity of compelling these appellees to pay for the wrong which has been done to them. It is submitted that one who procures a receivership cannot but act at his peril; he must be charged with the knowledge that he may have to defray expenses created by his own act; he must be held to have contemplated the consequences of his inauguration of a burden which may later be judicially declared to be an unnecessary, useless and wholly illegal burden; both in court and out of it, prudence requires that one should look before he leaps; and it is submitted that no principle of equity justifies either the confiscation or the depletion of a defendant's property in order to defray an expense occasioned by a wrongful situation initiated and continued by his opponent against his persistent and successful dissent.

And how stand the equities as between the receiver and the Presidio Mining Company? The former must, we submit, be charged with full knowledge of the existing and continuing situation; he well knew that the defendants below had opposed any receivership whatever, and that they had appealed from the order of appointment; and when this court announced its first decision of October 27, 1919, he had fair warning of the probable outcome of the controversy. At that time, he had expended for costs of this receivership only the sum of $14,729.10, allowed in his first annual account—the subject of Exception XII. But, at this point of time, and with the knowledge which he then had, what course lay open before him? He could have resigned

the office on the strength of the warning conveyed by the first decision of this court, or he could have exacted an indemnity for the Presidio Mining Company as a condition of continuing in the office (*Briarfield Iron Works v. Foster,* 54 Ala. 622, 633). On the other hand, he could, and he did, retain the office because, by reason of the views entertained by the learned judge of the court below, it was not feasible for the Presidio Mining Company, by action in the lower court, to dislodge him; and he might have looked forward to a reversal by this court of its original decision in the cause, meanwhile making further drafts upon the company's funds to the amount of $47,525.64 (Exceptions XIII, XIV, XV and X), of which sum $4524.88 (Exception X) was actually drawn by him from the company's funds five months after the mandate of this court issued upon its final decision of the cause (Transcript No. 3896, p. 508). Should equitable discretion, we ask, be exercised in favor of the originators of or participants in an illegal act, or in favor of the innocent sufferer by that illegal act?

Upon the whole, we respectfully pray the reversal of the order appealed from, and the issuance of a decree herein conformable to equity and good conscience.

Dated, San Francisco,
October 7, 1922.

Respectfully submitted,

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J. J. Dunne,
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